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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA,

NO: 2:04-CR-026-RMP

8 Plaintiff,

9 v.

ORDER DENYING DEFENDANT'S  
MOTION FILED PURSUANT TO 28  
U.S.C. § 2255

10 JOHN A. GRACE,

11 Defendant.

12  
13 BEFORE THE COURT is Defendant's motion filed pursuant to 28 U.S.C. §  
14 2255, ECF No. 255. The Court has reviewed the motion, the record, and is fully  
15 informed.

16 Defendant filed this petition with the Ninth Circuit Court of Appeals, but it  
17 was subsequently ordered to be filed with this Court. *See* ECF No. 256. As this  
18 Court liberally construes pro se pleadings, the Court considers Defendant's claims  
19 of "actual innocence" to serve as support for a petition filed pursuant to 28 U.S.C.  
20 § 2255. In relevant part, 28 U.S.C. § 2255 provides:

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ORDER DENYING DEFENDANT'S MOTION TO VACATE, SET ASIDE, OR  
CORRECT SENTENCE UNDER 28 U.S.C. § 2255~ 1

1 A prisoner in custody under sentence of a court established by Act of  
2 Congress claiming the right to be released upon the ground that the  
3 sentence was imposed in violation of the Constitution or laws of the  
4 United States, or that the court was without jurisdiction to impose  
5 such sentence, or that the sentence was in excess of the maximum  
6 authorized by law, or is otherwise subject to collateral attack, may  
7 move the court which imposed the sentence to vacate, set aside or  
8 correct the sentence.

9 28 U.S.C. § 2255(a).

10 Following a jury trial, Defendant was convicted in Count One of “knowingly  
11 and intentionally distributing [five] grams or more of a mixture or substance  
12 containing cocaine base” in violation of 21 U.S.C. § 841(a)(1), and in Count Two  
13 of “knowingly and by means and use of a dangerous weapon, that is, an  
14 automobile, forcibly assaulting a federal officer while he was engaged in the  
15 performance of his official duties,” in violation of 18 U.S.C. § 111(a)(1). ECF  
16 Nos. 72 and 135. On August 10, 2005, Defendant was sentenced to a term of  
17 incarceration of 120 months with credit for time served. ECF No. 179. On August  
18 24, 2006, the Ninth Circuit Court of Appeals affirmed Defendant’s conviction and  
19 sentence. *See* ECF No. 212.

20 After completion of that sentence, in 2014, Defendant was found to have  
21 violated the conditions of his supervised release and was sentenced to thirty-seven  
months of incarceration. *See* ECF No. 250. In the same year, 2014, in Case No.  
2:14-CR-25-RMP-1, Defendant was convicted of four counts of distribution of a  
mixture or substance containing a detectable amount of heroin in violation of 21

1 U.S.C. § 841(a)(1). On September 25, 2014, Defendant was sentenced to thirty  
2 months of incarceration to run consecutive to his thirty-seven month sentence on  
3 the supervised release violation conviction.

4 Defendant now is challenging the validity of his conviction of the 2004  
5 charges under 18 U.S.C. § 111. *See* ECF No. 255. Petitioner filed his motion with  
6 the Ninth Circuit on August 18, 2016, more than a decade after Defendant was  
7 sentenced for the conviction that he challenges, and nearly a decade following the  
8 affirmance of the same by the Ninth Circuit Court of Appeals.

9 A petition filed pursuant to 18 U.S.C. § 2255 is subject to a one-year statute  
10 of limitations. As explicitly stated in the statutory language:

11 The limitation period shall run from the latest of--

12 (1) the date on which the judgment of conviction becomes final;

13 (2) the date on which the impediment to making a motion created by  
governmental action in violation of the Constitution or laws of the  
United States is removed, if the movant was prevented from making a  
motion by such governmental action;

14 (3) the date on which the right asserted was initially recognized by the  
Supreme Court, if that right has been newly recognized by the Supreme  
Court and made retroactively applicable to cases on collateral review;  
15 or

16 (4) the date on which the facts supporting the claim or claims presented  
could have been discovered through the exercise of due diligence.

17 28 U.S.C. § 2255(f).

18 Defendant's conviction and sentence were affirmed on August 24, 2006.  
19 ECF No. 212. The United States Supreme Court has held that "for federal criminal  
20 defendants who do not file a petition for certiorari with this Court on direct review,  
21

1 § 2255's one-year limitation period starts to run when the time for seeking such  
2 review expires.” *Clay v. United States*, 537 U.S. 522, 532 (2003). Defendant did  
3 not file a petition for writ of certiorari with the United States Supreme Court, so his  
4 conviction became final ninety days after his conviction was affirmed in the Ninth  
5 Circuit Court of Appeals.<sup>1</sup> Using this first potential starting point for the running  
6 of the statute of limitations, Defendant's motion is far beyond the one-year time-  
7 bar.

8 Defendant's motion, even liberally construed, fails to allege a right that has  
9 been newly recognized by the Supreme Court, and fails to allege any impediment  
10 to making his motion caused by Government action. Therefore, the Court finds  
11 that the second and third possible starting points for the running of the relevant  
12 statutory of limitations period are irrelevant to the determination of the timeliness  
13 of Defendant's motion.

14 The final potential starting point for the running of the one-year statute of  
15 limitations is “the date on which the facts supporting the claim or claims presented  
16 could have been discovered through the exercise of due diligence.” 18 U.S.C. §  
17 2255(f)(4). Defendant details four “ground[s]” in support of his motion. *See* ECF

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19 <sup>1</sup> U.S. SUP. CT. R. 13 provides that a petition for review would be timely if filed  
20 within ninety days after entry of the judgment of the Ninth Circuit Court of  
21 Appeals.

1 No. 255. The Court has reviewed all of Defendant's arguments, most of which  
2 pertain to Defendant's view of the evidence presented at trial and how his theory of  
3 the case was stifled by his trial attorney's alleged failure to conduct tests or to  
4 present Defendant's arguments. *See id.* Defendant does not allege any barrier to  
5 his ability to have discovered those arguments or theories at an earlier date.  
6 Therefore, Defendant's arguments and theories all could have been presented well  
7 within the one-year statute of limitations had Defendant exercised due diligence.

8 Defendant first argues that there was a "break in the chain of custody" when  
9 the car that he was charged with using as a weapon was released to Thrifty Rental  
10 Car Company. *See* ECF No. 255 at 1. Defendant argues that the Government did  
11 not present DNA samples from blood taken from the vehicle and did not present  
12 documentation from a "ballistic expert." *Id.* at 1-2. Defendant asserts that these  
13 alleged facts should have supported a "motion to dismiss due to a Brady violation,"  
14 and that his attorney was ineffective for not having filed such a motion. *Id.* at 2.

15 Under "Ground Two," Defendant states that his attorney "was ineffective  
16 when he did not request the trial court to find the fact specifically as he might have  
17 done under Rule 23(c) of the F.R. Crim. P." *Id.* at 2. Defendant appears to be  
18 arguing that his conviction should be set aside because the Government could not  
19 prove that he had the requisite mens rea to be found guilty of assaulting a federal  
20 agent. Defendant also argues that "18 U.S.C. 111(a)(b) statute [sic] is  
21 Constitutionally vague on its face." *Id.* at 3. Again, Defendant's challenges are

1 based on facts that he knew during and immediately after the conclusion of his trial  
2 or would have known through the exercise of due diligence. Accordingly, these  
3 arguments fail to assist Defendant in overcoming the one-year time-bar.

4 Defendant's third argument is an assertion of ineffective assistance of  
5 counsel resulting from his trial counsel's alleged failure to present Defendant's  
6 theory of the case and to support that theory with physical evidence. Again,  
7 Defendant is returning to his version of the facts that resulted in his convictions as  
8 he argues (among other things) that he could not hear police orders through the  
9 window that he argues was rolled up; that he thought the federal agents who  
10 approached his vehicle were robbers; and that he was shot at from the side of the  
11 vehicle, so he could not have been driving towards the federal agent who shot him.  
12 Defendant argues that his version of the facts could have been supported by  
13 additional physical evidence had his attorney conducted an adequate investigation  
14 and presented the relevant facts. Even assuming the validity of Defendant's  
15 arguments, everything that Defendant is now arguing could have been argued well  
16 within a year of his judgment of conviction becoming final.

17 Defendant's fourth "ground" is based on his argument that his appellate  
18 counsel was ineffective for not arguing that his trial counsel was ineffective based  
19 on the same arguments detailed throughout the rest of his motion. Defendant  
20 focuses on his assertion that trial counsel "failed to test blood evidence prior to  
21 determining a trial strategy." ECF No. 255 at 10. There is no reason why

1 Defendant could not have presented this argument within a year of his judgment of  
2 conviction becoming final had he exercised due diligence.

3 Having found that Defendant's claims are time-barred, the Court denies his  
4 motion claiming "actual innocence."

### 5 **Certificate of Appealability**

6 An appeal of this Order may not be taken unless a circuit justice or judge  
7 issues a certificate of appealability (COA). 28 U.S.C. § 2253. The Court may only  
8 issue a COA "if the applicant has made a substantial showing of the denial of a  
9 constitutional right." *Id.* The U.S. Supreme Court held that

10 when the district court denies a habeas petition on procedural grounds  
11 without reaching the prisoner's underlying constitutional claim, a COA  
12 should issue (and an appeal of the district court's order may be taken)  
13 if the prisoner shows, at least, that jurists of reason would find it  
debatable whether the petition states a valid claim of the denial of a  
constitutional right, and that jurists of reason would find it debatable  
whether the district court was correct in its procedural ruling.

14 *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

15 Defendant has failed to provide reason to believe that any jurist of reason  
16 would find that he has stated a valid claim for denial of a constitutional right, or that  
17 Defendant's motion meets the time limitation of 28 U.S.C. § 2255(f). Therefore, the  
18 Court finds no basis to issue a certificate of appealability.

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ORDER DENYING DEFENDANT'S MOTION TO VACATE, SET ASIDE, OR  
CORRECT SENTENCE UNDER 28 U.S.C. § 2255~ 7

1 Accordingly, **IT IS HEREBY ORDERED:**

2 Defendant's motion filed pursuant to 28 U.S.C. § 2255, **ECF No. 255**, is  
3 **DENIED.**

4 The District Court Clerk is hereby directed to enter this Order and provide  
5 copies to counsel.

6 **DATED** this 5th day of July 2017.

7  
8 *s/Rosanna Malouf Peterson*  
9 ROSANNA MALOUF PETERSON  
10 United States District Judge  
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